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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

NO. 238

THOMAS E. PROCTOR, 2nd, JOHN RIKER PROCTOR, ESTHER B. PROCTOR, MARY P. CASE, EMMA M. RICE, GERALDINE M. CRAIG, NEIL W. RICE, HILDA R. AYER, THOMAS E. P. RICE; AND THOMAS M. REYNOLDS, DAVID BROUDE and BOSTON SAFE DEPOSIT AND TRUST COMPANY, Trustees Under The Last Will and Testament of THOMAS E. PROCTOR, Deceased, Petitioners,

v.

THE SAGAMORE BIG GAME CLUB, THE SYLVANIA CORPORATION, UNITED NATURAL GAS COMPANY, NATIONAL FUEL GAS COMPANY, FRANK G. ALTMAN, H. P. BOARTS, F. E. CARROLL, W. L. CARROLL, A. J. EISENHUTH, H. U. FLICKINGER, JOHN W. FLICKINGER, BERTHA E. JONES SHEARER, JOHN RUMMEL, A. C. THOMAS, WILLIAM WALKER, D. D. FLICKINGER, ANTONIA JOHNSON, CLYDE K. MOORE, GEORGE C. SCHRECONGOST, R. L. SEGER, L. E. THOMAS and E. C. WAREHAM

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT AND APPENDIX

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INDEX TO PETITION

	PAGE
Opinions Below	2
Jurisdiction	2
Questions Presented	2
Constitutional and Statutory Provisions Involved	3
Federal Rules of Civil Procedure Involved	5
Statement of the Case	6
Reasons for Granting the Writ	10
Conclusion	19

TABLE OF CITATIONS

CASES

Cathcart v. Commonwealth, 35 Pa. 108	17
City of Allegan, Mich. v. Consumers' Power Co., 72 Fed. 2d 477	18
Commonwealth v. Robinson, et al., 317 Pa. 321	16
Cooper v. Bushley, 72 Pa. 252	14
Coxe v. Gibson, 27 Pa. 160	13
Coxe v. Wolcott, 27 Pa. 154	13
Department of Public Assistance v. Reustle, 358 Pa. 111, 56 A. 2d 221	16
Dubois v. Hepburn, 35 U.S. 1, 9 L. Ed. 325	12
Elliott v. Moffet, 365 Pa. 247, 72 A. 2d 164	16
Hess v. Westerwick, 366 Pa. 90	18
Hunt v. Bradshaw, 251 F. 2d 103	10
Lee v. Newland, 164 Pa. 360	17
Ochoa v. Hernandezy Morales, 230 U. S. 139	18
Olwine v. Holman, 23 Pa. 279	16
Osmer v. Sheasley, 219 Pa. 390	17
Pennsylvania Range Boiler Co. v. City of Philadelphia, 344 Pa. 34, 23 A. 2d 723	16

Index to Appendix.

PAGE

Sergeant v. Ingersoll, 7 Pa. 340 16
Shalemiller v. McCarty, 55 Pa. 156 12
Steiner v. Coxe, 4 Pa. 13 13
Toebelman v. Missouri-Kansas Pipe Line Co. 130 F. 2d 1016 10

STATUTES

Act of April 3, 1804, P.L. 517, 4 Sm. L. 201 ..... 5, 16
Act of March 13, 1815, P. L. 177, 6 Sm. L. 229 ..... 5, 16, 18
Act of June 13, 1883, P. L. 89 12
Act of May 5, 1941, P.L. 38 ..... 4, 17

CONSTITUTION

United States Constitution, Amendment V 3, 18
Amendment VII 3, 10
Pennsylvania Constitution, Article I, Section 9 ..... 4, 18

PROCEDURAL RULES

Rule 56 of Federal Rules of Civil Procedure 5, 10

TEXT

31 C. J. S. Estoppel, Sec. 37 b 15

INDEX TO APPENDIX

Opinion of United States Court of Appeals for the Third Circuit 1

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT AND APPENDIX

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioners, Thomas E. Proctor, 2nd, John Riker Proctor, Esther B. Proctor, Mary P. Case, Emma M. Rice, Geraldine M. Craig, Neil W. Rice, Hilda R. Ayer, Thomas E. P. Rice; and Thomas M. Reynolds, David Broude, and Boston Safe Deposit and Trust Company, Trustees Under The Last Will and Testament of Thomas E. Proctor, Deceased, pray that a Writ of Certiorari issue to review the judgment of the Court of Ap-

peals for the Third Circuit entered in the above cause March 24, 1959, affirming the judgment of the United States District Court for the Western District of Pennsylvania.

OPINIONS BELOW

The Opinion of the Court of Appeals for the Third Circuit is reported in 265 F. (2d) 196, which is reproduced in the Appendix hereto, infra.

The Opinion of the District Court is reported in 166 F. Supp. 465, which is reproduced at (124a).

JURISDICTION

The Order of the Court of Appeals was entered on March 24, 1959. Plaintiffs' Petition for Rehearing was denied on April 27, 1959. The jurisdiction of this Court is invoked under Title 28, U. S. C. Section 1254 (1).

QUESTIONS PRESENTED

1. Have Petitioners' Constitutional rights to trial by jury been violated and the powers of the District Court and Circuit Court of Appeals been exceeded under Rule 56 where the District Court held that there was no payment of the taxes and no redemption of the land after the tax sales as a matter of law even though Petitioners offered evidence which, if believed by a jury would sustain a contrary holding?

2. Have the District Court and Circuit Court of Appeals wrongfully interpreted the decisional law of Pennsylvania in holding that at the time of the sale of the land in controversy by Proctor on October 1, 1894 to Elk Tanning Company, Proctor had no title to convey

so as to except and reserve his right to the gas even though this sale was made during the redemption period permitted under the Tax Sale Acts?

3. Have the District Court and Circuit Court of Appeals wrongfully interpreted the decisional law of Pennsylvania when they hold that the parties to a deed as well as those in privity are not bound by the recognition of title in another contained in the deed?

4. Has the District Court wrongfully interpreted the decisional law of Pennsylvania in holding that notes and memoranda of the Prothonotary were in fact the minutes of the Court?

5. Have Petitioners' Constitutional rights to due process of law been violated where the Court of Appeals affirmed the District Court's decision in favor of Respondents, but for a different reason, namely the reason that the Curative Act of Pennsylvania of May 5, 1941, P. L. 38, Section 1, validated the tax sales even though such act gave Petitioners no right to redeem their lands after such tax sales were thus validated?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment V to the Constitution of the United States:

> "No person shall be . . . deprived of life, liberty or property without due process of law. . . ."

Amendment VII to the Constitution of the United States:

> "In suits at common law, where value in controversy shall exceed twenty dollars, the right of

trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

Article I Section 9: Pennsylvania Constitution:

"... nor can he be deprived of his ... property, unless by the judgment of his peers or the law of the land."

Pennsylvania Statute Act of May 5, 1941 P. L. 38:

"Whenever heretofore any land has been sold by the county treasurer of any county for the purpose of securing the payment of delinquent taxes which were assessed and levied against such land, and the county treasurer in pursuance of such sale executed a deed for said lands, and the acknowledgment of such deed by the county treasurer was defective in any respect, or where the records of the court failed to show a minute of such acknowledgment in open court, such sale and such deed shall not be invalidated by reason of such defective acknowledgment, if, in all other respects, the laws relating to the holding of such sale were fully complied with and the deed was, in fact, acknowledged before a judge of said county; and all such treasurers' sales and treasurers' deeds are hereby ratified, confirmed and validated; and the title to any such land purchased by any persons or by the county commissioners of any county at such treasurers' sale and the deed executed and acknowledged to such purchaser is hereby declared to be as valid as if such deed had been acknowledged in open court, proper minute thereof made, and return of said tax sale duly made in full conformity with the law relating thereto.

Section 2. This act shall become effective immediately upon final enactment."

Pennsylvania Statute Act of April 3, 1804, P. L. 517, 4 Sm. L. 201, §2:

"... the same in open court of common pleas of the proper county duly to acknowledge. ..."

Pennsylvania Statute Act of March 13, 1815, P. L. 177, 6 Sm. L. 299, §3:

"... after the deeds are acknowledged in the court of common pleas of the proper county, by the treasurer. ..."

§4

"If the owner ... shall make ... within two years after such sale, an offer or legal tender of the amount of the taxes for which the said lands were sold, and the costs, together with the additional sum of twenty-five per cent on the same ... said owner ... shall be entitled to recover the same by due course of law. ..."

FEDERAL RULES OF CIVIL PROCEDURE INVOLVED

Rule 56. Summary Judgment of Federal Rules of Civil Procedure:

(c) "... The Judgment sought shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. ..."

STATEMENT

The petitioners are Thomas E. Proctor, 2nd, John Riker Proctor, Esther B. Proctor, Mary P. Case, Emma M. Rice, Geraldine M. Craig, Neil W. Rice, Hilda R. Ayer, Thomas E. P. Rice; and Thomas M. Reynolds, David Broude and Boston Safe Deposit and Trust Company, Trustees Under The Last Will and Testament of Thomas E. Proctor, Deceased, citizens of the State of Massachusetts, New Hampshire, New York and Dominion of Canada. They instituted this action in the United States District Court for the Western District of Pennsylvania against The Sagamore Big Game Club, The Sylvania Corporation, United Natural Gas Company, National Fuel Gas Company, Frank G. Altman, H. P. Boarts, F. E. Carroll, W. L. Carroll, A. J. Eisenhuth, H. U. Flickinger, John W. Flickinger, Bertha E. Jones Shearer, John Rummel, A. C. Thomas, William Walker, D. D. Flickinger, Antonia Johnson, Clyde K. Moore, George C. Schreckongost, R. L. Seger, L. E. Thomas and E. C. Wareham, citizens of the Western District of Pennsylvania, New Jersey, Indiana, New Mexico, North Carolina and Connecticut. The subject matter of the civil action involves gas rights in a tract of land situate in Benezette Township, Elk County, District of the Western District of Pennsylvania. Jurisdiction of the Court was based upon diversity of citizenship of parties, with the amount in controversy exceeding the jurisdictional amount and upon the land being situate in the Western District of Pennsylvania. The petitioners sought to recover damages for the wrongful taking of the natural gas from the tract of land. The case was decided in favor of respondent-defendants by his Honor, Judge Willson, in the Western

District of Pennsylvania, who directed that judgment be entered on respondent's motion for Summary Judgment in favor of defendants. The Court of Appeals for the Third Circuit, Judges Goodrich and Staley, Circuit Judges, and Steele, District Judge, affirmed the District Judge's decision on March 24, 1959, and denied the petitioner's petition for rehearing on April 27, 1959.

Thomas E. Proctor, Sr., ancestor of petitioners, on June 5, 1893, acquired by deed from William E. Bigler, et ux et al. the tract of unseated land in controversy (161a). The land was encumbered with unpaid taxes for the years 1892 and 1893. Proctor, Sr. made an agreement with the Elk Tanning Company to convey, inter alia, the land in controversy, excepting and reserving the minerals, gas and oil. Proctor, Sr. was to make the conveyance free and clear of debts through the year 1892.

Proctor Sr. executed and delivered his deed to Elk Tanning Company dated October 1, 1894, covering the land in controversy, as well as other lands, excepting and reserving, inter alia, the natural gas from said lands (163a). Elk Tanning Company paid the unpaid 1893 taxes on the properties in controversy on December 30, 1893 prior to the date of the deed of purchase from Proctor, Sr., and prior to the tax sale for the unpaid 1892 taxes, which sale occurred on June 11, 1894 (56a).

G. W. Childs appeared as purchaser on the Treasurer's records of the land in controversy at the tax sale of June 11, 1894, (56a) making payment in the amount of $113.70 for land which Proctor, Sr. had paid $7500.00 one year before. G. W. Childs was then president of

Elk Tanning Company and was acting on their behalf in the matter.

In connection with the 1894 tax sale, plaintiff properly filed in the District Court the affidavit of John G. Flemming presenting certain statements of Elk Tanning Company bearing upon the settlement of accounts between Elk Tanning Company and the Estate of Proctor, Sr., (Proctor, Sr. having died December 12, 1894) relating to the purchase from Proctor, Sr. of certain other lands not in controversy but contained in the deed of October 1, 1894 (92a-104a). These facts together with the deed of 1903 from Elk Tanning Company to Central Pennsylvania Lumber Company are sufficient to support a finding by a jury that Elk Tanning Company had undertaken to make Proctor's title perfect as of 1893, and that it had in fact done so as indicated by its act in 1903 in conveying the property subject to the exceptions and reservations contained in the Proctor deed (105a-108a). G. W. Childs then assigned on June 28, 1898 the treasurer's deed to Elk Tanning Company prior to their conveyance to Central Pennsylvania Lumber Company (61a).

The Central Pennsylvania Lumber Company did not pay taxes upon the land in controversy for the years 1912 and 1913 prior to the time of the alleged tax sale in 1914. Pennsylvania Lumber Company's real estate agent, McCauley, appears as purchaser of the land at the alleged tax sale in 1914.

The petitioners also contend that the deeds of the Treasurers of Elk County following the alleged tax sales of 1894 and 1914 were void for the reason that they were not acknowledged in Open Court of Common Pleas of

Elk County, Pennsylvania, as required by the statute under which the alleged sales were made. The Treasurer's record set forth that the said acknowledgement took place on July 3, 1894 and July 6, 1914 respectively. The minute book of the Court of Common Pleas of Elk County on the dates mentioned contains no reference whatsoever of the Treasurer being in the Court for any purpose or that any Treasurer's Deeds were acknowledged (90a). Petitioners contend that such minutes are conclusive under the law of Pennsylvania and may not be contradicted. The District Court held that certain memoranda or notes of the prothonotary were the minutes of the Court. The Circuit Court of Appeals introduced into the case a Curative Act of the Pennsylvania Legislature, the Act of May 5, 1941, P. L. 38 Sec. 1, 21 P. S. 283. This Act purported to make valid prior acknowledgments of Treasurer's deeds "where the records of this court failed to show a minute of such acknowledgment in open court." Petitioners contend that this Act violated both the Federal Constitution and the Constitution of Pennsylvania in that it failed to provide an opportunity for redemption of the land from the tax sale, a right vested in the owners of this land under the laws of Pennsylvania.

The petitioners contend that one claiming under a deed is bound by the reservations and recognition of title in another contained therein. The instruments of conveyance under which defendants claim their title contain no conveyance of the gas and in fact recognize the title to such to be in Proctor, Sr. and his successors. This recognition in said deeds of the title of Proctor, Sr. to the gas, the petitioners feel, in and of itself, should make it improper for a Court to render summary judg-

ment under Rule 56 and certainly in conjunction with the other facts set forth herein above presents a factual issue for determination by a jury.

REASONS FOR GRANTING THE WRIT

Admittedly plaintiffs showed a prima facie title to the gas in controversy. The defendants made claim of title under one or both of two tax sales occurring in 1894 and 1914 respectively. The plaintiffs made three answers to defendants' claim of title:

First: Factual questions exist in reference to the tax sales of 1894 and 1914 as to whether there was payment of the taxes or the land redeemed from the tax sales and as to what the parties intended as shown by their subsequent deeds and acts. These factual issues were decided by the District Court and the Circuit Court of Appeals. In deciding these issues the Circuit Court and the District Court exceeded their powers under Rule 56 of the Federal Rules of Civil Procedure and violated Amendment VII of the Constitution of the United States.

The case of *Hunt v. Bradshaw*, 251 F. 2d 103, at page 108, holds that:

> ". . . when there is a debatable issue of fact in the trial of a suit at common law in a court of the United States, the right to have it determined by a jury is guaranteed by the Seventh Amendment of the Constitution."

The case of *Toebelman v. Missouri-Kansas Pipe Line Co.*, 130 F. (2d) 1016, at page 1018, holds that under Civil Procedure Rule 56 ". . . a substantial dispute as to a material fact forecloses summary judgment."

Under the facts presented a jury could find:

(a) that the tax for 1892 involved in the 1894 tax sale had been paid or the tax sale redeemed in accordance with an agreement between the parties.

To support such findings, plaintiffs submitted proof as follows:

That Thomas E. Proctor, Sr. sold to Elk Training Company certain tracts of land, among which was the tract in controversy, excepting and reserving, inter alia, the natural gas and other minerals, and did execute, together with his wife, a deed of conveyance to said Elk Tanning Company dated October 1st, 1894, which was accepted by Elk Tanning Company (163a); that the record in the Treasurer's office named G. W. Childs as the purchaser of the land in controversy for 1892 taxes (56a); that Elk Tanning Company, by its President, said G. W. Childs, wrote to the Trustees of the Thomas E. Proctor Estate on May 7, 1897 enclosing certain statements of account between Elk Tanning Company and Thomas E. Proctor Estate, including taxes for 1892 and other years against certain other lands not in controversy but conveyed in the same Proctor deed of October 1, 1894, and in connection therewith noted that "The first three items above, being the 1892 Taxes, paid by E. T. Co., at tax sale 1894 for account of Proctor, to make his title perfect as of 1893." (94a, 102a); that G. W. Childs et ux. assigned to Elk Tanning Company on June 28, 1898 the Treasurer's tax deed for the tract in controversy (61a); that Elk Tanning Company conveyed by its deed to Central Pennsylvania Lumber Company, dated May 25, 1903, inter alia, the land in controversy subject to all exceptions and reservations contained in the deed from Thomas E. Proctor and wife to

Elk Tanning Company dated October 1st, 1894 (105a, 108a). This deed was signed by Childs as president and acknowledged by him as attorney-in-fact for his Company.

In connection with the deed of Proctor to Elk Tanning Company of October 1, 1894, it becomes necessary to discuss the position of the trial court and the Circuit Court. The trial court and the Circuit Court held that Proctor had no title to sell as of October 1, 1894 for the reason that at the time of the tax sale as of June 11, 1894 the title to the $7500.00 land became vested in G. W. Childs, the President of Elk Tanning Company, on Child's payment of $113.70. The redemption period was two years under the Tax Sales Act involved. October 1 was well within this period of permissible redemption. The petitioners rely upon *Shalemiller v. McCarty*, 55 Pa. 186 and *Dubois v. Hepburn*, 35 U. S. 1, 9 L. Ed. 325, to show that the owner is not divested of his title until after the two years has elapsed. To hold otherwise, as stated in *Shalemiller v. McCarty*, the purchaser at tax sale on payment of a few dollars could strip the land within the redemption period and leave nothing worth redeeming. The law of Pennsylvania, as contended by petitioners, was recognized by the Pennsylvania Legislature when it passed the Act of June 13, 1883, P. L. 89, Sec. 1 (12 P. S. 1463) permitting the purchaser of lands at tax sale to obtain a writ of estrepment to prevent waste on the land during the redemption period.

Petitioners contend that the facts which they have shown are facts from which a jury could find that the tax sale purchaser (Elk Tanning Company by their President, G. W. Childs) was obliged to pay the very taxes for which the tax sale was made, and in fact did

so, citing the case of *Coxe v. Gibson,* 27 Pa. 160, through G. W. Childs. Petitioners also contend that the facts which they have shown are facts from which a jury could find that there was an actual redemption of the land after the tax sale by the acts of the party purchasing the land at the sale (Elk Tanning Company) and the owner Proctor. It is possible under the law for redemption between the parties to occur even after the two year redemption period so as to invalidate an otherwise valid tax sale. See *Coxe v. Wolcott,* 27 Pa. 154 and *Steiner v. Coxe,* 4 Pa. 13.

(b) as to the 1914 tax sale for 1912 and 1913 taxes, the alleged tax sale purchase amounted to a mere payment of taxes. The Circuit Court did not touch upon this problem, but the District Court held that the facts did not show payment or redemption.

It was the duty, even though not personal obligation, of Central Pennsylvania Lumber Company, as owner of the land in controversy, to pay the taxes thereon; this it did not do for the years 1912 and 1913; when the treasurer, in 1914 placed the land for sale, the Central Pennsylvania Lumber Company had its real estate agent, C. H. McCauley, Jr., pay to the Treasurer, with the money of Central Pennsylvania Lumber Company, $186.27, the amount of the taxes, costs and interest, and had a Treasurer's deed made to him even though it was not recorded until October 9, 1957 after the institution of this action; that McCauley, Jr., by writing dated November 2, 1914, declared the above facts and agreed that he would upon request assign the tax deed as directed by said Central Pennsylvania Lumber Company; that Central Pennsylvania Lumber Company by written agreement dated July 30, 1920, agreed to sell

the tract of land in controversy to Andrew Jackson Eisenhuth, reciting it as being "the same tract of land conveyed by Thomas E. Proctor and wife to the Elk Tanning Company by deed dated October 1st, 1894, and the same tract of land conveyed by the Elk Tanning Company to the Central Pennsylvania Lumber Company by deed dated May 25th, 1903, and the deed which followed and carried out said agreement of July 23, 1920, contains the same description of the land conveyed as in said agreement.

In the case of *Cooper v. Bushley*, 72 Pa. 252, relied upon by the petitioners, it was held as a matter of law that after the duty to pay taxes on the land is breached and a sale ensues, the owner purchasing at the sale acquires no title but he is being compelled to pay his own taxes with interest and costs for his prior omission.

C. H. McCauley, Jr., at the request of Central Pennsylvania Lumber Company, did, on February 1, 1921, quitclaim his interest in said Warrant 5343 acquired at the tax sale in 1914 to Andrew Jackson Eisenhuth; McCauley delivered the quitclaim deed to Central Pennsylvania Lumber Company, which Company placed the same of record on March 6, 1925; neither the quitclaim deed nor the tax sale purchase was referred to in the deed of Eisenhuth to The Sagamore Big Game Club; from which facts a jury could infer the purpose of the quitclaim deed to be the removal of a cloud from the title to the land conveyed by the Central Pennsylvania Lumber Company to Eisenhuth on December 6, 1920.

The deed of conveyance following the above in defendants' line of title was from Eisenhuth to The Sagamore Big Game Club by deed of June 8, 1921 and recited

the land conveyed as "Being the same tract of land conveyed to the said Andrew Jackson Eisenhuth by deed of the Central Pennsylvania Lumber Company, dated the 6th day of September A. D. 1920. . . ."

From all of the above, the inference is warranted that the parties in the line of title of defendants intended to convey the land in controversy subject to the exceptions and reservations of the gas in Proctor.

(c) that as affecting both tax sales a jury could find that the recitals and reservations contained in the deeds in defendants' line of title recognized the title to the gas and other minerals under the lands conveyed therein to be in plaintiffs through their predecessor in title.

There is no deed of conveyance to which the defendants can point that discloses a reliance by the grantors on either or both of the tax deeds involved. The various grantors described the property they conveyed as being the same tract of land conveyed by the Proctor deed, or described the property they conveyed as being the same tract of land conveyed in a deed later than the Proctor deed, but which, in turn, referred to the Proctor deed as a description of the property conveyed. We treat the legal effect of the recognition of title in another (i. e. Proctor's title to the gas) in our argument on Estoppel by Deed which appears hereinafter. But certainly the recital as to the reservation of title to the gas in the deeds of conveyance even after the tax deeds in question raises at least a question of fact as to what the parties intended to convey by their deeds. See 31 C. J. S. Estoppel, Sec. 37 b. The bringing to the attention of the grantees in the various deeds of conveyance the reserva-

tion of the gas in Proctor gave notice to these various grantees of the outstanding claim in the title to the gas, and if they thought they were actually purchasing the right to the gas, they were at least on notice by their own deeds that there was a claim in another. They cannot thus claim to be innocent purchasers without any knowledge of the outstanding claim of title to the gas. See *Sergeant v. Ingersoll*, 7 Pa. 340; *Pennsylvania Range Boiler Co. v. City of Philadelphia*, 344 Pa. 34, 23 A. 2d 723; *Department of Public Assistance v. Reustle*, 358 Pa. 111, 56 A. 2d 221.

Second: That under the law of Pennsylvania one claiming under a deed is bound by the reservation and recognition of title in another which is contained in it.

Olwine v. Holman, 23 Pa. 279

Elliott v. Moffet, 365 Pa. 247, 252, 74 A. 2d 164.

Third: The tax sales were void for want of acknowledgment in open court.

The Acts of 1804 and 1815 under which the alleged sales are claimed to have been made required the treasurer to acknowledge his tax deeds in open Court of Common Pleas.

The Circuit Court and the District Court erroneously decided that there were valid acknowledgments of the tax deeds under the Pennsylvania Act of April 3, 1804, P. L. 517, 4 Sm. L. 201, Sec. 2 as supplemented by the Act of March 13, 1815, P. L. 177, 6 Sm. L. 299, Sec. 3. These acts require that the tax sale deeds be acknowledged in open court of Common Pleas.

The Common Pleas Court is a Court of Record. Judicial acts in courts of record can be proved only if

some entry thereof is made in the Court's own minute book. See *Commonwealth v. Robinson et al.*, 317 Pa. 321, 176 A. 908 and *Cathcart v. Commonwealth*, 37 Pa. 108. Such entry may be supplemented by memoranda of the Prothonotary or Clerk. *Central Pennsylvania Lumber Company v. Bristol*, 250 Pa. 61, 95 A. 383.

The minute book of the Court of Common Pleas of Elk County contains no entry whatsoever concerning the acknowledgment of any tax deeds or the appearance of the Treasurer for any purpose on the dates on which defendants claim the tax deeds were acknowledged. The District Court erroneously held that notes and memoranda of the Prothonotary of Elk County were in fact the minutes of the Court. See *Lee v. Newland*, 164 Pa. 360, 30 A. 285; and *Osmer v. Sheasley*, 219 Pa. 390, 68 A. 965. The protection given by the Legislature to the owner of unseated land in providing a place to look, viz., the minutes of the Court of Common Pleas, to see if his land has been sold for taxes, is thus defeated.

The Circuit Court did not adopt the reasoning of the lower Court in deciding that the tax deeds were valid, but introduced into the case the Curative Act of Pennsylvania Legislature of May 5, 1941, P. L. 38, Sec. 1, 21 P. S. Sec. 283 which purported to cure the invalidity of a tax deed which was invalid because the "... records of the court failed to show a minute of such acknowledgment in open court ...." This act contained no provision whatsoever for the redemption by the owner of his land after the validation of the tax sale.

By virtue of the aforementioned acts under which the tax sales were held, the owner of unseated land was given the right to redeem his land from a valid tax sale

within two years. 1815, March 13, P. L. 177, 6 Sm. L. 299, Sec. 4, 72 P. S. Sec. 6091—1931 ed. The Act of 1941 purported to validate such tax sales where records failed to show a minute of the acknowledgment of the tax deed in open Court. The owners of land had a vested right to redeem their land if a valid tax sale occurred under such tax sales acts. The Act of 1941 failed to provide the owner any right to redeem his land even though the Act purported to validate such sale as is presently involved. The Court held in the case of *City of Allegan, Mich., v. Consumers' Power Co.*, 72 Fed. 2d 477, at page 480, that even though the Legislature could do subsequently what it originally had the power to do, it could do so only ". . . providing no vested interests have meanwhile arisen." The rights of plaintiffs were already vested as of 1941.

The Curative Act of 1941 neither complies with the United States Constitution nor the Constitution of Pennsylvania. Amendment V of the Constitution of the United States provides that "No person shall . . . be deprived of life, liberty or property, without due process of law . . ." And Article I, Sec. 9, of the Constitution of Pennsylvania provides that: ". . . nor can be deprived of his . . . property, unless by the judgment of his peers or the law of this land." These due process provisions ". . . inhibit the taking of one man's property and giving it to another, contrary to settled usages and modes of procedure, and without notice or an opportunity for a hearing."

Hess v. Westerwick, 366 Pa. 90, citing *Ochoa v. Hernandezy Morales*, 230 U. S. 139, at page 161.

CONCLUSION

For the foregoing reasons this petition for writ of certiorari should be granted.

Respectfully submitted,

HERBERT R. CARROLL
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APPENDIX

UNITED STATES COURT OF APPEALS
For the Third Circuit

No. 12,715

THOMAS E. PROCTOR, 2ND, JOHN RIKER PROCTOR, ESTHER B. PROCTOR, MARY P. CASE, EMMA M. RICE, GERALDINE M. CRAIG, NEIL W. RICE, HILDA R. AYER, THOMAS E. P. RICE AND THOMAS W. REYNOLDS, DAVID BROUDE AND BOSTON SAFE DEPOSIT AND TRUST COMPANY, Trustees Under the Last Will and Testament of THOMAS E. PROCTOR, Deceased,

Appellants

v.

THE SAGAMORE BIG GAME CLUB, THE SYLVANIA CORPORATION, UNITED NATURAL GAS COMPANY, NATIONAL FUEL GAS COMPANY, FRANK G. ALTMAN, H. P. BOARTS, F. E. CARROLL, W. L. CARROLL, A. J. EISENHUTH, H. U. FLICKINGER, JOHN W. FLICKINGER, BERTHA E. JONES SHEARER, JOHN RUMMEL, A. C. THOMAS, WILLIAM WALKER, D. D. FLICKINGER, ANTONIA JOHNSON, CLYDE K. MOORE, GEORGE C. SCHRECONGOST, R. L. SEGER, L. E. THOMAS AND E. C. WAREHAM.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Argued February 3, 1959

Before GOODRICH and STALEY, *Cricuit Judges*, and STEEL, *District Judge*.

Decided—Mar. 24, 1959
Pet. for Rehearing—April 8, 1959
Pet. Denied—April 27, 1959

Opinion of the Court

(Filed March 24, 1959)

By STEEL, *District Judge*

This is an appeal from a summary judgment for defendants.

At stake is the ownership and right to possession of natural gas underlying unseated lands[1] known as Warrant 5343 in Elk County, Pennsylvania. A discovery well completed in April 1953 and seven subsequent wells, the last of which was completed in September 1954, demonstrated that these lands had substantial value because of the existence of subsurface natural gas in commercial quantities. The present action followed.

Plaintiffs claim to be either the legal or equitable owners of the natural gas underlying and produced and sold from the lands. Defendants are rival claimants who are alleged to be trespassers. They comprise persons and corporations claiming ownership of the warrant with royalty rights in the gas, a lessee-producer, and a purchaser of the gas. Plaintiffs seek possessory, monetary and injunctive relief, and an adjudication that

1. When lands fail to disclose improvements indicating a personal responsibility of the owner for the taxes, the assessor must return the lands as unseated. *Hutchinson v. Kline*, 199 Pa. 564, 49 Atl. 312, 313 (1901); Whitworth, *Tax Sale and Titles and the Evidence of the Same in Pennsylvania*, Chapter IV, page 52, § 29 (1900).

defendants hold the gas as trustees for plaintiffs. Plaintiffs made timely demand for a trial by jury.[2]

All parties have properly relied upon Pennsylvania law as dispositive of their rights, since the sole basis of jurisdiction of the District Court was diversity of citizenship.

In determining whether summary judgment for defendants was properly granted, we must accept as true all facts and inferences therefrom which tend to support plaintiffs' claim regardless of any denial thereof by defendants. It is not our province to resolve disputed questions of fact, but only to determine whether genuine issues of material fact exist. The Court below found, and we think correctly, that if all of the facts and inferences therefrom relied upon by plaintiffs were accepted as true, defendants were entitled to judgment as a matter of law.

Preliminarily, it is desirable to say a word about the record upon which our decision will be based. Many of plaintiffs' arguments pertaining to its equitable interest in the gas rest upon unsworn statements by plaintiffs' attorneys as to the contents of documents and the existence of facts detailed in Plaintiffs' Statement of Position and Plaintiffs' Reply to Defendants' Statement of Position. These were filed for use at a pre-trial conference at a time when a trial was in contemplation. These self-serving unverified statements of fact asserted by plaintiffs are not the type of proof which Rule 56(c) requires for the resolution of a motion for summary judgment.

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2. It is assumed that the action is appropriate to be tried to a jury, although we have given no consideration to this question.

Nor are the unsworn statements concerning the contents of documents adequate under Rule 56(e). Nevertheless, it appears from the position of the defendants at pre-trial, the decision of the Court below, and the brief of the defendants in this Court, that the defendants, both in this Court and in the District Court, were willing to accept as true for the purpose of testing defendants' motion for summary judgment all of the factual statements contained in plaintiffs' statements of position.[3] Accordingly, we shall likewise do so.

An itemization of each link in the chain of title through which the parties claim is not necessary. It is enough to say that plaintiffs base their title upon that of their deceased ancestor, Thomas E. Proctor, Sr., to whose rights, if any, they have succeeded. The title and

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3. The idea of testing plaintiffs' case by a motion for summary judgment was advanced at a pre-trial conference at which Plaintiffs' Statement of Position and Plaintiffs' Reply to Defendants' Statement of Position were discussed. Both parties expressed the view that the filing of such a motion would be desirable and defendants indicated they would be willing to have their motion tested by conceding the truth of the "extraneous matters" which plaintiffs had adduced at the conference. Transcript Pre-Trial, September 23, 1959 (Doc. 75), pp. 8, 18, 36, 39, 41-42.

The opinion of the District Court discussed many of the unverified facts relied upon by plaintiffs. So did defendants in their brief in this Court. Defendants made no objection to the statements except on the grounds of relevancy.

Some of the statements made by plaintiffs constituted legal conclusions. These conclusions were not admitted by defendants. Nor will they be accepted as true by us except as such conclusions are warranted by the factual statements and applicable legal principles.

other interests claimed by defendants derive through one G. W. Childs who purported to purchase Warrant 5343 at a tax sale in 1894 immediately prior to which Proctor was the owner.

To prevail, plaintiffs must first establish that Proctor's title, either legal or equitable, survived the tax sale. A plaintiff seeking to recover the possession of an estate in land must do so upon the strength of his own title, not upon the imperfections in the title of a defendant. *Taylor v. Taylor*, 228 Pa. 424, 77 Atl. 663 (1910); *Zeller v. American International Corp.*, 271 Pa. 472, 114 Atl. 778 (1921); *Henry v. Grove*, 356 Pa. 541, 52 A.2d 451 (1947). Subsurface gas in place is an estate in land. *F. H. Rockwell & Co. v. Warren County*, 28 Pa. 430, 77 Atl. 665 (1910).

I.

On June 5, 1893 Proctor acquired title to Warrant 5343 from Bigler et al. At the time the taxes for 1892 and 1893 had been assessed against the warrant as unseated lands, were unpaid, and constituted a lien upon the warrant. On June 11, 1894 the treasurer of Elk County sold the warrant for the 1892 taxes. G. W. Childs was the purchaser and he received a deed from the treasurer dated June 11, 1894.

The tax sale and the treasurer's deed, if valid, conferred upon Childs a fee simple title. Act of April 3, 1804, P. L. 517, 4 Sm. L. 201 §2; *White v. First National Bank of Emporium*, 24 F. Supp. 290, 293 (M. D. Pa. 1938). This included not only the surface of the land but subsurface natural gas as well. See *Powell v. Lantzy*, 173 Pa. St. 543.

34 Atl. 450 (1896).[4] On June 8, 1898 Childs assigned his tax deed to Elk Tanning Company. The claim of defendants rests upon the tax sale to Childs, the assignment of the tax deed to Elk Tanning Company, and subsequent conveyances and leases.

On October 1, 1894, three months after the tax sale, Proctor purported to convey the same warrant to Elk Tanning Company by a deed which reserved to himself and to his heirs and assigns, all of the natural gas in, upon or under the lands. Plaintiffs base their claim to the natural gas on the title which Proctor acquired from Bigler and on the reservation in Proctor's deed to Elk Tanning Company, even though the latter deed was not executed until three months after the delivery of the tax deed to Childs. Plaintiffs argue that the gas reservation in the Proctor deed was valid because the prior tax deed to Childs was invalid and hence Proctor's title was not divested thereby. The invalidity of the tax deed, plaintiffs say, was due to the failure of the treasurer to acknowledge the tax deed in open court as was required by Section 2 of the Act of April 3, 1804, P. L. 517, 4 Sm. L. 201. This omission is established, plaintiffs assert, by the failure of the "Trial List and Court Minutes" of the Court of Common Pleas of Elk County to make any reference to the acknowledgement. But the silence of the minutes in this regard does not invalidate the sale if

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4. If there had been a severance of the title of the gas from the title of the surface prior to the assessments for 1892 and 1893, and if each of the several interests had been separately assessed, a tax sale would have carried with it the title only to the particular estate as to which taxes were in default. *F. H. Rockwell & Co. v. Warren County, supra.* But there had been no such prior severance.

in fact the tax deed was acknowledged in open court. The Act of May 5, 1941, P. L. 38 §1; 21 P. S. §283 was enacted to make tax titles secure against just such an argument as plaintiffs make.[5]

The evidence is uncontroverted that the acknowledgment did in fact take place in open court on July 3,

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5. 21 P. S. §283 provides:

"Whenever heretofore any land has been sold by the county treasurer of any county for the purpose of securing the payment of delinquent taxes which were assessed and levied against such land, and the county treasurer in pursuance of such sale executed a deed for said lands, and the acknowledgment of such deed by the county treasurer was defective in any respect, or where the records of the court failed to show a minute of such acknowledgment in open court, such sale and such deed shall not be invalidated by reason of such defective acknowledgment, if, in all other respects, the laws relating to the holding of such sale were fully complied with and the deed was, in fact, acknowledged before a judge of said county; and all such treasurers' sales and treasurers' deeds are hereby ratified, confirmed and validated; and the title to any such land purchased by any person or by the county commissioners of any county at such treasurers' sale and the deed executed and acknowledged to such purchaser is herey declared to be as valid as if such deed had been acknowledged in open court and a proper minute thereof made in full conformity with the law relating thereto. 1941, May 5, P. L. 38, §1."

Plaintiffs' argument that the "Trial List and Court Minutes" are irrebuttable proof that the treasurer's deed was not acknowledged in open court is based upon decisions which antedate the enactment of 21 P. S. §283. Defendants take exception to the interpretation which the plaintiffs have placed on the decisions. In view of the statute this interpretive controversy need not be resolved.

1894. The certificate of the Prothonotary endorsed on the deed says so, and it is prima facie evidence of that fact. Act of May 11, 1911, P. L. 257, §1, 21 P. S. §48. An entry in the book entitled "Acknowledgment of Treasurer's Deeds" kept in the Office of the Prothonotary in Elk County likewise attests the open court acknowledgment on July 3, 1894. The "Trial List and Court Minutes" reveal that the Court of Common Pleas of Elk County sat on July 3, 1894. Plaintiffs' contention that the tax deed was invalid because it was not acknowleged in open court is untenable.

It is of no moment that Proctor, in his deed to Elk Tanning Company, reserved the natural gas to himself and to his heirs and assigns. If the tax sale to Childs cut off all of Proctor's legal title to the warrant, including his title to the natural gas, subject only to his right of redemption under Pennsylvania law[6]—as we hold that it did—then when Proctor gave his deed to Elk Tanning Company, he had no legal title in the surface to convey to Elk Tanning Company or in the natural gas to reserve to himself. The reservation could not revive in Proctor the legal title which he had lost by the earlier tax sale.

II.

Plaintiffs next contend that even if the treasurer's acknowledgment of the tax deed to Childs was valid and Childs purchased a good legal title thereby, nevertheless Proctor retained an equitable interest in the gas. Plain-

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6. In a request by defendants that plaintiffs admit certain facts, plaintiffs said in part:

> "The plaintiffs admit that if a redemption was necessary to avoid said alleged tax sale, no such redemption was made."

tiffs say that they "proposed to prove facts" showing an agreement between Proctor and Elk Tanning Company under which the latter assumed to clear Proctor's title to Warrant 5343 of all debts and encumbrances through 1892 and that it did so either by way of payment of the tax or redemption of the warrant from the sale; or alternatively, that Elk Tanning Company failed to carry out its commitment as a result of which the warrant was acquired by it by fraud. The effect of the summary judgment, plaintiffs say, is to deprive them of their right to present to the jury for its determination the issues of payment, redemption and fraud.[7]

The difficulty with this argument is that there are no facts before us from which the existence of an agreement between Proctor and Elk Tanning Company such as plaintiffs postulate can be found either directly or by implication.[8] Plaintiffs' proposal to prove the agreement at the trial is not enough to defeat the summary judgment motion. The liberality of our treatment of the facts

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7. Statements in the record indicate a concession by plaintiffs that Proctor did not pay the taxes on the warrant. Other parts of the record, however, make it clear that the concession related only to a direct payment by Proctor, and that plaintiffs reserved the right to contend that the tax sale and its ramifications were equivalent in law to a payment of the tax on Proctor's behalf. Pre-trial Transcript (Doc. 75) pp. 23-26.

Plaintiffs have admitted that the warrant was not redeemed (see f.n. 6), without any reservation comparable to that pertaining to the issue of payment.

8. If in fact such an agreement did exist, other impediments to plaintiffs' recovery immediately suggest themselves, but a discussion of them would be superfluous.

included in plaintiffs' statements of their position cannot be stretched to the point where we accept as true what plaintiffs characterize as "the well-founded supposition" that at one time such an agreement existed; particularly as defendants have refused to concede the existence of such an agreement. A party who desires to resist a motion for summary judgment cannot hold back his evidence until trial, but must bring it before the Court when the motion is heard so that it may then be judicially evaluated. *Engl v. Aetna Life Ins. Co.*, 139 F.2d 469, 473 (2d Cir. 1943); 6 Moore Federal Practice, ¶ 56.11 (2d Ed.).

But wholly apart from any agreement between Proctor and Elk Tanning Company such as plaintiffs hypothesize, it is at least inferable that the tax sale purchase was simply a means whereby Elk Tanning Company, acting through its president Childs, acquired title to Warrant 5343 in furtherance of a written agreement dated January 25, 1893 between Proctor and other tannery owners, including Childs, to consolidate their businesses and bark lands in United States Leather Company; and that the consolidation was effected by Proctor and the other tanners by conveying their properties, including Warrant 5343, to wholly owned subsidiaries of United States Leather Company, including Elk Tanning Company, in consideration for stock of the latter company.[9] The agreement of January 25, 1893 expressly provided that

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9. While Warrant 5343 was not owned by Proctor when the January 25, 1893 contract was entered into, it is not unlikely that its acquisition was in contemplation

At the time when the January 25, 1893 contract was entered into Elk Tanning Company had not been organized.

when the bark lands were conveyed, the oil, gas and minerals should be reserved to the grantors. Other evidence tends to confirm this intention. It can be inferred, therefore, that when Childs acquired the tax deed for Elk Tanning Company, the latter acquired title to a larger estate than was intended because of a mutual mistake of law as to the effect of the transaction. If this were so, Elk Tanning Company, was unjustly enriched and a constructive trust in the natural gas arose in which Proctor and his successors in interest were the beneficial or equitable owners. Restatement, Restitution §§ 48, 50, 160 (Comment a.), 163; 3 Scott on Trusts §§462.5, 465, 466. Pennsylvania has recognized the latitudinous principle that a constructive trust may arise against one who has been unjustly enriched even though he has been guilty of no act of wrongdoing. *Dubin Paper Co. v. Insurance Co. of North America,* 361 Pa. 68, 63 A.2d 85, 94 (1949).

But even assuming that a constructive trust did arise in Proctor's favor following the tax sale, still plaintiffs are barred from maintaining the action. Plaintiffs' asserted rights came into being in 1894, more than 60 years before the present suit was begun. The District Court held that the action was barred by the Third Section of the Act of April 3, 1804, P. L. 517; 4 Sm.L. 201.[10] Whether this statute has application to the type of claim here involved need not be determined. For the five-year period of limitation imposed by the Act of April 22, 1856, P.L. 532 §6, 12 P.S. § 83 was intended to

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10. This provides:

". . . [N]o action for recovery of said lands [unseated lands sold at tax sale] shall lie, unless the same be brought within five years after the sale thereof, for taxes as aforesaid . . .".

protect landholders from just such an equitable claim as is here asserted.[11] It is a statute of repose which was intended to insure greater certainty of title and make more secure the enjoyment of real estate against a claim based upon an "implied trust". *Ross v. Suburban Counties Realty Corporation*, 356 Pa. 126, 51 A.2d 700, 701 (1947). The term "implied trust" in 12 P.S. § 83 includes a constructive trust. *McKean & Elk Land & Imp. Co. v. Clay*, 149 Pa. St. 277, 24 Atl. (1892); *Johnson v. Hobensack*, 318 Pa. 305, 178 Atl. 40 (1935); *Gast v. Engel*, 369 Pa. 137, 85 A.2d 403 (1952).

Once a constructive trust has arisen, even the ignorance of the beneficiary of his rights will not toll the period of limitation fixed by 12 P.S. § 83 unless the trust was the result of a fraud. The statute says as much.

Fraud can be proven only by evidence which is clear, explicit and unequivocal. See, *e.g.*, *Modern Baking Co v. Orringer*, 271 Pa. 152, 114 Atl. 264 (1921); *Martin v. Baird*, 175 Pa.St. 540, 34 Atl. 809, 812 (1896); *Bayout v. Bayout*, 373 Pa. 549, 96 A.2d 876 (1953); *Wagner v. Somerset County Memorial Park*, 372 Pa. 338, 93 A.2d 440 (1953). Not only is the record devoid of proof which meets this high standard, but indeed it is barren of any evidence of fraud in the circumstances attending the

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11. 12 P.S. § 83 provides:

"No right of entry shall accrue, or action be maintained . . . to enforce . . . any implied or resulting trust as to realty, but within five years after such . . . trust accrued . . .: Provided that as to anyone affected with a trust, by reason of his fraud the said limitation shall begin to run only from the discovery thereof, or when, by reasonable diligence, the party defrauded might have discovered the same . . ." (Inapplicable language deleted).

tax sale. At most, the evidence points to a bona fide mistake as to its legal consequences. In these circumstances the statute of limitations presents an insuperable bar to the action.

The view which we have taken of the matter makes it unnecessary for us to consider other arguments advanced by the parties.

The judgment of the District Court will be affirmed.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.